Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In re: BERNARD J. DOLENZ, Petitioner

RESPONSE TO PETITION FOR A WRIT OF PROHIBITION, WRIT OF MANDAMUS, OR BOTH

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January 25, 1989

22 pp

PREFACE

Respondents were not served with a Petition for Prohibition or Mandamus which is in content or form in accordance with Rule 27 or Rule 33 of this Court. Respondents therefore set forth the following.

QUESTION PRESENTED

1. Will a Writ of Prohibition or Mandamus issue to restrict a District Court in the exercise of its admiralty jurisdiction where the district court's jurisdiction is predicated on a finding of fact.

LIST OF PARTIES

The parties to the proceedings below were the vessel "Aries Startrek", enrollment No. 555798 and the respondent herein, Stuart Yacht Builders, Inc. Melissa Keyes filed a claim in accord with Supplemental Rule C(6). The case was tried before the Honorable William J. Zloch, also a respondent herein.

The petitioner, Bernard Dolenz, filed no pleadings in the district court until subsequent to the trial of this cause. He has not intervened, nor has he filed an appearance as attorney on behalf of the vessel "Aries Startrek."

Although Bernard Dolenz has represented to this court that he is appearing pro se the interest represented is that of the Defendant vessel, "Aries Startrek."

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The respondents, Stuart Yacht Builders, Inc., and William J. Zloch respectfully pray that the requested Writs of Prohibition or Mandamus not issue and that the Petition of Bernard J. Dolenz be denied.

OPINIONS BELOW

The Final Judgment of the district court for the southern district of Florida has not been reported. A reprint of this opinion is attached in the Appendix hereto at page 1.

The order of the District Court for the Southern District of Florida denying the motions of Bernard Dolenz to dismiss, for intervention, and for reconsideration has not been published. A reprint is attached in the Appendix hereto at page 17.

The order of the district court for the Southern District of Florida Denying Petitioner's Motion for Substitution has not been reported. A reprint is attached in the Appendix hereto at page 19.

The decision of The Eleventh Circuit dismissing the appeal of Bernard J. Dolenz has not been reported. A reprint is attached in the Appendix hereto at page 26.

The decision of the Eleventh Circuit

Court of Appeals denying the Petition for Prohibition or Mandamus of Bernard J. Dolenz has not been reported. A reprint of the order is attached in the Appendix hereto at page 28.

JURISDICTION

The respondent invoked the jurisdiction of the District Court for the Southern District of Florida pursuant to 28 U.S.C. §1333 and 46 U.S.C. §971.

This case was tried to the court on March 16, 1987. The district court entered a final judgment on February 16, 1988.

Petitioner herein, Bernard J. Dolenz, filed a Motion to Dismiss and sought to intervene in the case on March 18, 1987. The district court denied the motion for intervention and the motion to dismiss on September 25, 1987.

The petitioner filed a Motion to Substitute Parties on 31 March, 1988. This motion was denied April 22, 1988.

The petitioner herein filed a Notice of Appeal in The Eleventh Circuit on April 14, 1988. A Motion for Extension of Time in which to file the appeal was denied by the district court on April 22, 1988. The appeal was dismissed on August 11, 1988, for lack of jurisdiction. The Petitioner's Motion for Rehearing was denied by the Eleventh Circuit on September 29, 1988.

A Petition for Writ of Prohibition or Writ of Mandamus was filed by the Petitioner Bernard J. Dolenz on October 1, 1987. This petition was denied by the Eleventh Circuit on October 21, 1987. The Petitioner sought reconsideration of the denial of mandamus. This Motion was denied on January 27, 1988.

The petitioner herein seeks to invoke the jurisdiction of this court pursuant to 28

U.S.C. §1651(a) for the review of some or all of the above stated orders.

STATUTES INVOLVED

28 U.S.C. §1333.Admiralty, Maritime and Prize Cases

> The district court shall have original jurisdiction, exclusive of the courts of the states, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. §971. Persons entitled to lien

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

STATEMENT OF FACTS

The respondent herein, Stuart Yacht Builders, Inc. filed an In Rem claim against

the vessel "Aries Startrek" in the District Court for the Southern District of Florida. The vessel was seized by the United States Marshal on July 10, 1986, and the respondent was designated as substitute custodian for the vessel.

The claim of Melissa Keyes as the owner of the vessel was served together with her answer and affirmative defenses on August 4, 1986.

The case was tried to The Honorable William Zloch on March 16, 1987.

The court called the case on the morning of March 16, 1987. At that time the court was advised by counsel for Melissa Keyes and by Melissa Keyes that she had transferred her ownership interest in the vessel to Bernard J. Dolenz on the preceding day. Melissa Keyes further advised the court that she had no authority to represent the new owner Bernard J. Dolenz; that her legal counsel Lyman Reynolds had no authority to

represent the owner; that neither she nor her legal counsel had the authority to represent the defendant vessel and specifically that she had no authority to request a continuance on behalf of the owner, Bernard J. Dolenz.

The court made further inquiry of Melissa Keyes and determined that Bernard J. Dolenz had been a partner in the vessel for some months preceding the date of trial. That Bernard J. Dolenz was an attorney authorized to practice in the State of Texas and was aware that the trial of this cause was to occur on March 16th in the District Court for the Southern District of Florida. The court noted that no communication had been received by Bernard Dolenz either through the mails, through any private delivery service, or by telephone.

The court accepted evidence in the form of documents and testimony presented by the plaintiff. The court then called the

defendants case to which no one responded although Melissa Keyes was present in the courtroom at that time.

Bernard Dolenz two days following trial filed a Motion to Dismiss for lack of jurisdiction and a Motion to Intervene. The court after consideration denied all motions and entered a final judgment in this cause which was docketed on February 22, 1988.

The petitioner, Bernard J. Dolenz filed a Notice of Appeal with The Eleventh Circuit which appeal was dismissed for lack of jurisdiction because the notice was untimely filed. Petitioner herein filed a notice for reconsideration of the Eleventh Circuit's dismissal which was denied on September 29, 1988. Petitioner Bernard J. Dolenz filed a Petition for Writ of Mandamus and/or Prohibition in The Eleventh Circuit Court of Appeals on October 1, 1987, which was denied on October 21, 1987.

The grounds upon which petitioner asserts that the district court lacks jurisdiction are that the vessel is not navigable, or is not complete, or is a "dead ship" and therefore not within the jurisdictional scope of 28 U.S.C. §1333 and 46 U.S.C. §971.

The District Court found specifically that the Defendant "Aries Startrek" was a vessel within the meaning of 46 U.S.C. §971.

REASONS FOR NOT GRANTING THE WRITS

The petitioner, Bernard Dolenz seeks to have this Court determine the status of the defendant vessel "Aries Startrek." The status of the "Aries Startrek" as a "vessel" within the meaning of 28 U.S.C. §1333 and 46 U.S.C. §971 is central to the district court's jurisdiction to enforce a maritime lien. The determination of a "vessel's" status necessarily involves questions of fact to be determined by the district court upon the evidence presented to it. The

petitioner contends that the "Aries Startrek" was (1) a vessel removed from navigation, i.e. a "dead ship", or (2) that the labor and materials for which respondent claims its lien were for construction of a new vessel rather than repairs.

The history of the "dead ship" doctrine is too lengthy to be set out herein. It should suffice to say that a vessel removed from navigation with no intent to return it to navigation is not a "vessel" subject to admiralty jurisdiction. The principal determination to be made by the district court in applying the "dead ship" doctrine is one of intent to return the vessel to navigation. Hercules Company v. The Brigadier General Absolom, 214 F.2d 66, (3rd Cir. 1954); Pleason v. Gulfport Shipbuilding, 221 F.2d 621, (5th Cir. 1955); Grauwiller Transportation v. King, 131 F. Supp. 630 (Dist. Crt. E. D. NY 1955)

The finding of intent required for the application of the "dead Ship" doctrine is a finding of fact properly to be made, in this instance, by the district court upon the evidence submitted to it. The petitioner before this court seeks to collaterally attack the findings of fact made by the district court in determining that it possessed the jurisdiction to enforce a maritime lien against the vessel "Aries Startrek."

This court has previously held that where the jurisdiction of a district court is predicated on a finding of fact neither mandamus nor prohibition will issue. In re Muir. "The Gleneden", 254 U.S. 522; 41 S. Ct. 185 (1921).

The facts in The Gleneden are analogous to those here. "The Gleneden" was arrested in rem, in admiralty in the District Court for the District of New Jersey. The "Gleneden" asserted as defense to the suit

that the vessel was immune from the issuance of process in admiralty because it was a vessel of the British Government. A hearing was held on the merits of this claim at which time the "Gleneden" was called upon to produce evidence to support the allegation of immunity. The vessel failed to produce such proof and the District Court determined the vessel to be subject to process in admiralty.

This court in discussing the case stated that the district court had prima facia jurisdiction of the suit and of the vessel and that the burden of showing otherwise was upon the party challenging such jurisdiction.

> From all that has been said it is apparent that the status of the Gleneden, judged in the light of what was done and shown in the district court, is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel.

The Gleneden, 41 S. Ct. 185, 188 (U.S. 1921).

The court held that the determination of the status of a vessel and the consequent determination of jurisdiction was not the proper subject for a writ of prohibition or mandamus.

A Writ of Prohibition issues as a matter of right only where lack of jurisdiction is plain. Where jurisdiction is debatable and requires a determination of status, prohibition and mandamus are inappropriate remedies. In re: Hussein Lutfi Bey, 256 U.S. 616; 41 S. Ct. 609 (1921).

In a case which is the converse of that before this court petitioner sought mandamus to have the District court vacate its order of dismissal and reinstate the cause. This court in addressing the issue stated: "This is, in effect, asking us to direct the District court to decide in a particular way the matter heard before it, which is never

the office of a mandamus." (citations omitted) Morrison v. District Court, 147 U.S. 14, 26; 13 S. Ct. 246, 250 (1893).

The petitioner herein argues alternatively that if the "Aries Startrek" was not a "dead ship" that the contract under which the labor and materials were supplied was one for the construction of a vessel rather than repairs. Again, petitioner requests that this court make a factual determination regarding the status of the "Aries Startrek" as a collateral attack upon the jurisdiction of the District court. If the contract in question was one for the construction of a new vessel rather than repairs the District court would lack jurisdiction to enforce maritime lien pursuant to 46 U.S.C. §971.
The Francis McDonald, 254 U.S. 240; 41 S. Ct. 65 (1920).

The petitioner failed to appear at the trial of this cause and present any evidence.

The owner of record, Melissa Keyes, although present during the trial failed to present any evidence. The trial court had before it the master carpenter Certificate of Completion dated December 31, 1968, reflecting that the vessel was built and completed in Tai Pai, Taiwan, The Republic of China in that year. (Appendix at page 29). Additionally the District court had before it the consolidated Certificate of Enrollment and Yacht License for the "Aries Startrek" reflecting that the vessel was built and completed in 1968. The Aries Startrek was documented in Miami, Florida in 1973. (Appendix at page 30).

The arguments previously made relative to the "dead ship" doctrine and the propriety of a Writ of Mandamus or Prohibition to attack the jurisdiction of the District court are equally applicable to this argument of the petitioner.

In addition it may be noted that when the "Aries Startrek" was launched in 1968 it became a vessel for purposes of maritime jurisdiction and was subject to liens pursuant to 46 U.S.C. §971. The Pinthis; Victory Carriers, Inc. v. Morner, 286 F.2d 122 (3rd Cir. 1923). The "Aries Startrek" was launched 18 years prior to the institution of this suit and had been documented as a vessel at least 13 years prior to the institution of this suit.

The survey and newspaper articles upon which the petitioner attempts to rely as "evidence" do not appear in the record in the District court. Respondent will not argue the propriety of a collateral attack upon the jurisdiction of the District court by extrinsic evidence in the absence of a request from this court to do so. Such argument is unneccessary in light of the analysis set forth in The Gleneden, 254 U.S. 522; 41 S. Ct. 185 (1921), and Morrison v.

District Court, 147 U.S. 14; 13 S. Ct. 246 (1893).

The extraordinary writs of mandamus and prohibition will issue only on a showing of extreme circumstances and only where a party seeking the writ has no other remedy. Morrison v. District Court, 147 U.S. 14; 13 S. Ct. 246 (1893). The petitioner has stated that the remedy provided by the Eleventh Circuit was inadequate. The petitioner had an adequate remedy by way of appeal to The Eleventh Circuit if he had not failed to timely file his Notice of Appeal.

The Petitioner failed to appear and present any evidence to the District Court and the Petitioner failed to timely file a Notice of Appeal in The Eleventh Circuit. What petitioner now seeks is to have this court relieve him of the burden created by his own errors.

CONCLUSION

For the foregoing reasons the Respondents pray that this Court deny The Petition of Bernard J. Dolenz for Prohibition or Mandamus or Both and grant Respondents such additional relief as may be appropriate.

Respectfully submitted,

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January 25, 1989